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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

v.

ALLAN BAKKE,
Respondent

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

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BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE

INTEREST OF THE AMICUS

The American Bar Association is an unincorporated voluntary association, the members of which are attorneys practicing in all parts of the United States. With over 211,000 members, the ABA is the largest organization of the legal profession in this country. The purposes of the ABA include the preservation of representative government, the maintenance of high professional standards, the promotion of the administration of justice, and the application of the knowledge and experience of the profession to the furtherance of the public good.

In 1967, the ABA endorsed the development of a national program to encourage and assist qualified but disadvantaged persons from minority groups to enter law school and the legal profession. This action was taken because, although minorities constitute a significant part of our population, they comprise only a small percentage of the

legal profession.* The ABA recognizes that lawyers have traditionally played a leading role in the political, economic, and social development of our country, and that the presence of more lawyers from minority groups is essential if the legal profession is to be responsive to the needs of society as a whole.

Perceiving the importance of increased minority enrollment in law schools, the ABA became one of the sponsors and constituent members of the Council on Legal Education Opportunity ("CLEO"), a program designed "to increase the number of lawyers from economically and educationally disadvantaged backgrounds." The goal of CLEO is "to shift law school admission policy away from the mechanized approach of judging the applicants on grades and LSAT scores alone."** Thus, the ABA has long advocated the use of such admissions programs as will be effective means of achieving broad representation of minority groups in the legal profession. This commitment is demonstrated by the following ABA resolution:

> Resolved, that the American Bar Association encourages programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school.***

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*Statistics indicate that less than 2% of the bar is black, and that other minority groups have even less representation. O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va. L. Rev. 925, 943 (1974).

**A. Slocum and R. Huber, CLEO: A Narrative Report, 2 (Jan. 31, 1977) (unpublished memorandum in the Library of the American Bar Association).

***Summary of Action Taken by the House of Delegates of the American Bar Association, p. 17 (February, 1972).

CONSENT OF THE PARTIES

We present this brief with the consent of counsel for both the petitioner and the respondent. Copies of the consenting letters have been filed with the Clerk.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Certiorari was granted on February 22, 1977.

QUESTION PRESENTED

Does the Fourteenth Amendment to the United States Constitution prohibit officers of a state university from considering, among other factors, an applicant's racial or ethnic background in selecting students for admission from a large group of qualified applicants in order to diversify the student population, thereby improving the quality of education of all students, furthering the career opportunities of qualified disadvantaged members of society, and increasing the responsiveness of the professions to the needs of society as a whole?

ARGUMENT

THE CONSIDERATION OF RACE FOR THE PURPOSE OF PROMOTING THE PROFESSIONAL EDUCATION OF MEMBERS OF MINORITY GROUPS WHICH ARE UNDERREPRESENTED IN PROFESSIONAL SCHOOLS AND PRACTICE IS CONSTITUTIONALLY PERMISSIBLE.

A. Consideration may be given to race along with other factors in determining the applicants to be accepted in a professional school when the object is not invidious discrimination but is to make professional education available to members of minority groups.

This Court has often upheld reliance upon racial and ethnic characteristics in programs that promote the integration of minorities into society.* Only a few months ago, in considering the permissibility of the use of racial criteria in the reapportionment of voting districts, Justice White, writing for the majority, stated that, "[N]either the Fourteenth nor the Fifteenth Amendment mandates any

*The federal government has shown concern for the disadvantaged status of different minority groups by requiring various affirmative action programs. *E.g., Morton* v. *Mancari*, 417 U.S. 535 (1974) (job preferences for American Indians); *Lau* v. *Nichols*, 414 U.S. 563 (1974) (bilingual education for non-English speaking Chinese students); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (prohibiting disenfranchisement of Spanish speaking voters); *United States* v. *Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) (educational plan ordered to give special consideration to Mexican-American students); *Serna* v. *Portales Mun. Schools*, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974) (bilingual, bicultural education program).

per se rule against using racial factors in districting and apportionment." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 45 U.S.L.W. 4221, 4226 (U.S. March 1, 1977). In his concurrence in that case, Justice Brennan emphasized the validity of voluntary and judicially imposed plans which employ racial criteria (45 U.S.L.W. at 4228-29):

> I begin with the settled principle that not every remedial use of race is forbidden. For example, we have authorized and even required race-conscious remedies in a variety of corrective settings. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971); *United States* v. *Montgomery Board of Education*, 395 U.S. 225 (1969); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976).

This principle has long been applied by this Court in cases concerning integration of the nation's public schools. *E.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In *Swann*, the Court unanimously affirmed the right of educational policymakers to take into account a pupil's race in assigning students to particular schools in order to promote integration (402 U.S. at 16):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Similarly, lower courts have recognized the importance of considering race in school integration cases. In *United*

States v. *Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966), Judge Wisdom declared:

> The defendants err in their contention that the HEW and the courts cannot take race into consideration in establishing standards for desegregation. "[T]he Constitution is not this color blind." [footnote omitted.]
>
> . . . [T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

The Court in *Offermann* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967), authorized school districts to consider race in implementing the policies of *Brown* v. *Board of Education*. In concluding that a finding of *de jure* segregation is not necessary to justify the use of racial criteria, the Second Circuit stated (378 F.2d at 24-25):

> Consideration of race is necessary to carry out the mandate in *Brown*, and has been used . . . in cases following *Brown*. Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem.

As in the school desegregation cases, the Davis Medical School has taken race into consideration as a means of promoting more equal educational opportunities and fuller integration. Recognition of race for such a benign purpose has been accepted by this Court as constitutionally permissible. (*North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971)):

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, *so also must race be considered in formulating a remedy*. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation . . . . (emphasis supplied.)

See also Morrow v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970).

The consideration of racial criteria to equalize educational opportunities and further integration does not result in invidious discrimination against minority applicants—the only type of situation, we note, in which this Court has struck down racial classifications. *E.g., Loving* v. *Virginia*, 388 U.S. 1 (1967); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879). Implicit in invidious discrimination is treatment of a discrete and insular minority in a manner that stigmatizes, excludes or disadvantages its members. Concededly, exclusion of minorities from professional schools on the basis of race or ethnic origin would be patently unconstitutional. But the instant situation does not present such a case.

Rather than stigmatizing minorities, the Davis program attempts to undo the results of decades of discrimination. Since all of Davis' minority students are considered by the school to be qualified,* no stigma of inferiority can or should be attached to them. Indeed, the program recognizes the positive value of having an ethnically and racially diverse student

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*Record, vol. 1, at 67. "Every admittee to the Davis Medical School, whether admitted under the regular admissions program or the special admissions program, is fully qualified for admission and will, in the opinion of the Admissions Committee, contribute to the School and the profession."

body. The Admissions Committee's use of race or ethnicity as one of many criteria in accepting a minority applicant no more detracts from his or her ability to be an effective and competent physician than would its consideration of an applicant's artistic achievements, undergraduate field or rural upbringing.

The administration at Davis has the discretion, within constitutional bounds, to determine the composition of the student body that it believes would best promote the training of competent physicians. Courts long have appreciated the importance of leaving such decisions to the school administrators who possess special expertise in this area. Justice Powell, writing for the majority, recognized that the case of *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973), presented "persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." Only where "state policy . . . operates to hinder vindication of federal constitutional guarantees" or invidiously discriminates on the basis of race or ethnic origin will courts interfere with the "wide discretion [of school authorities] in formulating school policy." *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971).

Davis' admissions policy resembles many voluntary remedial programs that have been upheld by a majority of the circuits.* Thus, in *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), where school authorities abolished promotional lists in order to increase the number of black administrators better to meet the needs of the school system, the court strongly affirmed their action (431 F.2d at 1257-58):

> State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment. Proper integration of faculties is as important as proper integration of schools themselves, as set forth in Brown v. Board of Education [citation omitted]. . . .
>
> • • •
>
> It would therefore seem that the Boards of Education have a very definite affirmative duty to integrate school faculties . . . [To] permit a great imbalance in faculties . . . would be in negation of the Fourteenth Amendment to the Constitution and the line of cases which have followed Brown v. Board of Education, *supra*.*

These principles should also govern the conduct of school authorities in determining who should be admitted.

B. An Educational Program Which Encourages the Admission of Minority Students to Professional Schools Serves Legitimate and Substantial State Interests.

In the exercise of their proper administrative discretion, many professional schools have fashioned admissions policies which seek to select a student body that approximates a microcosm of society. The aim of these programs is not to represent proportionally each segment of society, but rather to provide a class sufficiently varied to expose each student to the viewpoints of individuals of different backgrounds. To accomplish this purpose, schools long have admitted appli-

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See Patterson v. Newspaper & Mail Deliverers' Union of New York & Vicinity, 514 F.2d 767 (2d Cir. 1975); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974); Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972); S. Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970).

*Additionally, it should be noted that, like Davis' program, the Newark Board of Education's policy was adopted voluntarily and in the absence of past intentional discrimination.

cants from different geographic regions. Additionally, factors such as undergraduate areas of specialization, work experience, military service, age, particular handicaps, athletic achievements and professional aspirations are considered. Legislation, such as Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, forbidding sex discrimination in education, has resulted in the admission of an increased number of women, leading to even greater diversity of the student bodies. Just as individuals from these varied backgrounds and interests contribute to the vitality of the academic experience, so will students from varied ethnic and racial heritages bring an added dimension to the professional education of all. Consideration of these factors does not, of course, result in a lowering of the professional standards of quality.

The value of having a student body that is racially and ethnically diverse, as well as economically, academically, culturally and geographically varied, lies in the "socially significant" nature of race. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653, 685-86 (1975).* The importance of racial and ethnic diversity can be illustrated by considering two hypothetical classroom discussions of *Brown* v. *Board of Education, supra*, 347 U.S. 483, and its progeny,** one involving only white students and the other consisting of a racially mixed class. The addition of a significant number of minority students to the class would probably result in a greater understanding of the practical

*Other commentators have also recognized the enriching influence ethnic and racial minority students have on their classmates. *E.g.*, Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 516-18 (1975).

**Brief of the President and Fellows of Harvard College as Amicus Curiae at 38, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

and psychological problems involved in school integration.*

The Medical School at Davis recognizes that the importance of diversity is not limited to the school but extends to the medical profession as well (Record, vol. 1, at 68):

> The non-disadvantaged professors, students and members of the medical profession with whom the disadvantaged fellow student or doctor comes into contact will be influenced and enriched by that contact. They will be exposed to the ideas, needs, and concerns of the disadvantaged minorities and thereby may be enlisted in meeting their medical needs.

The same reasoning applies with equal force to the legal profession. Although the American Bar Association is interested in the diversification of the student bodies in all professional schools, as an organization representing the legal profession it is concerned both with maintaining the standards of the profession and with promoting the admission of law students of diverse backgrounds to improve the quality of legal education and the profession. The ABA believes that the interchange of ideas between lawyers of varied backgrounds enhances their ability to deal effectively with the problems they confront. Diversity among members of the bar will help make the legal profession more responsive to the needs of all segments of our heterogeneous society. For example, lawyers practicing in areas such as consumer, housing or criminal law may be more attuned to the particular interests of their minority clients if they have been able to discuss similar problems with colleagues whose backgrounds are closer to those of the clients. Sim-

*Furthermore, inclusion of these minority students in the class also would expose white students to the varying viewpoints held by different members of a particular minority group. *See* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653, 686 (1975).

ilarly, a lawyer whose client's interest is adverse to that of a minority group member may have a better understanding of that client's case if he or she has been exposed to various perspectives which can be contributed by minority lawyers.

This Court has recognized the importance of a heterogeneous academic environment in which there can be a free and vigorous interchange of ideas (*Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950)):

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Furthermore, although we agree with Justice Douglas' observation in *DeFunis* v. *Odegaard*, 416 U.S. 312, 342 (1974) that "[t]he purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish [but] . . . to produce good lawyers for Americans . . . ," we recognize that the existence of barriers between the races in our society may make it easier for a minority client to relate to and place confidence in a minority lawyer. Moreover, statistics demonstrate that minority law students are more likely to specialize in areas where legal services are presently inadequate.*

Input from minority members of the bar not only adds to lawyers' comprehension of the needs of minority com-

*American Bar Association, *Memorandum from S. Edlund to Members of the Program Coordinating Committee of the American Bar Association* (Feb. 28, 1977) (unpublished memorandum in the Library of the American Bar Association).

munities but also aids in all spheres of legal representation and decision-making. Lawyers often play a vital role in formulating policy which affects society as a whole. One recent example is the part played by lawyers in New York City's fiscal crisis. Decisions made regarding cutbacks in public services had an impact on each New Yorker, including many members of the minority communities. Those people charged with making decisions which influence the daily lives of the city's residents should be sensitive to the needs of all interests in the city. This understanding may best be insured by having members of the city's various racial and ethnic minorities represented among lawyers, bankers and politicians involved in the decision-making process.

Additionally, legal training is often a stepping stone or prerequisite to political, governmental and judicial careers where representation by persons familiar with the interests of the various segments of society is particularly important. Programs designed to increase the number of minority students who receive legal training help insure that the needs of many of society's underrepresented groups will not be forgotten or minimized. Minority group members in political and governmental positions not only will represent people of similar backgrounds but also will apprise their colleagues of their particular group's interests, thus furthering the ultimate goal of having politicians and administrators, irrespective of race or ethnic origin, effectively represent all of society.*

The benefits of such programs become even more significant when viewed in the context of their effects upon all segments of society. By opening doors to professional

*The absence of minorities in law schools not only is detrimental to the quality of legal education, the profession and society, but also deprives minorities of the ability to compete effectively for positions in government, politics and the judiciary.

careers to qualified minority students, the programs compensate for the inferior primary and secondary education that many such students received. A significant number of minority applicants attended schools in districts that later were ordered desegregated pursuant to the mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954).*

The inferior primary and secondary educations received by many minority group students, combined with the heightened competition for admission, often deters minorities from applying to professional schools. Programs which provide minorities with an incentive to apply to professional schools will allow our nation's law schools to attract many promising disadvantaged minority group members whose test scores and undergraduate grades may be lower than those of many white applicants, but who offer additional and varied perceptions that will enrich the law school experience of all students, benefit the legal profession and contribute much to their communities.

Furthermore, a greater number of minority professionals will provide good role models for younger members of these communities and will encourage minority youngsters to seek positions which they previously may have considered inaccessible. Greenawalt, *Judicial Scrutiny of Benign Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 592-93 (1975). As the Dean of Admissions of Davis emphasized (Record, vol. 1, at 68):

> Practice in disadvantaged communities by minority physicians will provide an example to younger persons in these areas demonstrating that disadvantaged and minority persons can break the cycle of hopelessness in which families do not improve their educational or economic status over generations.

Once minority children begin to aspire to professional roles, they will be more motivated to develop their academic skills.

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*This Court recognized that such segregated school systems were inherently inferior. *Brown* v. *Board of Educ.*, 347 U.S. 483, 495 (1954).

This process of providing encouragement to minority youth will result in upward social mobility and, ultimately, a more integrated society.

The factor of example is particularly critical in the training of lawyers. The visible participation of minorities in the administration of law and justice gives to members of the minority community a greater sense of confidence in the operation of the judicial system. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 518 (1975). By correcting racial misperceptions, this fuller integration of minorities into the economic and social mainstream cannot but benefit all parts of society.

C. Programs To Encourage And Promote the Admission of Minority Students to Professional Schools Satisfy Any of the Tests Which Are Invoked in Construing the Equal Protection Clause.

For the reasons stated above, facilitation and promotion of the entry of minority students to professional schools will effectuate the underlying purpose of the Equal Protection Clause of the Fourteenth Amendment. Programs which serve that purpose accordingly should be held constitutional whether the test be rational relationship to a legitimate state objective, compelling state interest, or something in between or all-inclusive.

1. In most equal protection cases, the Court determines whether a challenged program bears a rational relationship to a legitimate state objective.* However, when a classification involves a "suspect" group or a "fundamental interest," the Court has employed a stricter standard to determine whether the challenged scheme serves a compelling state interest through the least restrictive means available.**

**E.g.*, *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

***E.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Loving* v. *Va.*, 388 U.S. 1 (1967).

This Court has often treated state use of racial classifications as "suspect". But those cases have involved disadvantageous or hostile behavior directed against a racial group.* As we have already demonstrated, the Equal Protection Clause does not prohibit all classifications based upon race. When racial criteria have been employed in an ameliorative fashion, as is true of the Davis admissions program, this Court has approved of such use without resorting to a strict scrutiny approach. *E.g., United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (U.S. March 1, 1977); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969).

In the absence of invidious discrimination or a constitutionally protected right, the Court should apply the traditional equal protection standard and examine whether the special admissions program is rationally related to the legitimate state goals we have described above. Under this test, the Court must determine only whether the use of racial or ethnic criteria in the admissions process, to further the University's goals of creating diversity, promoting integration and increasing professional responsiveness, is an arbitrary or capricious use of such classifications.

We submit that by its very nature, a program which encourages the enrollment of racial and ethnic minorities is rationally related to the State University's undisputedly legitimate goals of integration, diversity and improvement of the profession.

2. Although we believe that the level of scrutiny required by the traditional rationality test is sufficient to determine

*All of these cases have involved discrimination by the majority against a racial minority. No such detriment to any minority group results from the action taken by the Davis faculty.

the constitutionality of the Davis program, the program could also withstand the more precise analysis that this Court has sometimes used when examining classifications based upon immutable or sensitive characteristics. In some circumstances it applies what may be called an intermediate scrutiny test, less than the "most exacting" but by no means "toothless". *Trimble* v. *Gordon,* 45 U.S.L.W. 4395, 4396 (U.S. April 26, 1977).* In his dissent in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 99 (1973) Justice Marshall urged that the Court should

> "scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. . . . that is, an approach in which 'concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.' *Dandridge* v. *Williams,* 397 U.S. at 520-21 (dissenting opinion)."

Under this intermediate approach the Court considers whether the gains derived from a particular program encouraging minority admissions outweigh any possible detrimental effects. Among the gains which actually have been achieved through the program here involved are increased minority enrollment in the medical school and increased minority membership in the medical profession.** This increase in minority admissions not only serves the well-articulated and substantial state interest of remedying past discrimination but

*Other cases adopting this approach include *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *James* v. *Strange,* 407 U.S. 128 (1972); *Reed* v. Reed, 404 U.S. 71 (1971). *See also* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972).

**Record, vol. 1, at 67.

also will result in the improvement of medical education, the profession itself and society as a whole. We believe that these gains outweigh any possible detriments incidental to such admissions programs.

Two of the possible detriments often discussed are stigmatization and polarization along racial lines. Again, we emphasize that the program is entirely voluntary and that no member of a racial minority is compelled to apply through this program. There is no reason to believe that a member of a racial group would enter a program which would lead him or her to feel stigmatized or demeaned.*

Moreover, once it is understood that race, just as college grades and test scores, is only one of the criteria used in admissions decisions, there will be no reason for such stigmatization or polarization. Respondent was denied admission not solely because he is white but because

> taking into account a considerable complex of factors, including the fact that he was not a member of a minority group, a judgment was made that the overall structure of the first year class . . . would better apportion the opportunities of . . . [professional] education and reflect the needs of the community if another were selected rather than he.**

3. Even if the strict scrutiny test is applied, the state interests served by the programs which accomplish this objective are nothing short of compelling. Integration in education is of paramount importance, and it cannot be achieved unless substantial numbers of minority students are admitted to professional schools. The battle to eliminate segregation and its pernicious effects, thereby promoting the objectives of the Fourteenth Amendment, cannot otherwise be won.

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*O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va. L. Rev. 925, 941 (1974).

**Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 519 (1975).

Remedial admissions programs are the least restrictive means to achieve not only the goals of a diverse student body and a more responsive profession but also a society better integrated at all levels. Without such a program, the number of minority students will be insignificant.* None of the alternatives suggested by critics of such programs will result in the enrollment of an adequate number of minority applicants into the professional schools. Before implementation of remedial programs, schools had attempted to attract minority applicants through vigorous recruitment efforts. Nevertheless, minority enrollment declined.**

Those who contend that the only permissible remedial program is the improvement of primary and secondary education ignore the injustice of excluding from professional schools the present generation of minority applicants, most of whom were born after but did not benefit from the equal

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*Record, vol. 1, at 67-68.

**See O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va. L. Rev. 925, 950 (1974).

Furthermore, even the implemention of some special admissions programs has not stemmed the tide of a decrease in black enrollment in law schools. A. Slocum & R. Huber, CLEO: A Narrative Report, 56-57 (Jan. 31, 1977) (unpublished memorandum in the Library of the American Bar Association):

> The March, 1975 issue of the Association of American Law Schools' Newsletter indicates that 1974 marks the first time since the onset of "special admission" programs in law school that the number of Blacks admitted to first-year law study decreased. It is suspected that the declining trend will not only continue, but will soon be reflected in statistics associated with other minority groups. . . .
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> * * *
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> If a decrease in minority admissions holds true, in the near future a frightful condition will exist where the demand increases but the supply dwindles and yet, with proper assistance from CLEO, many of the difficulties of admission to and matriculation in law school can be overcome.

education ordered by this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).*

Disadvantaged minorities are most likely to have worked and lived under the greatest educational handicaps, and therefore, are most in need of programs constructed to compensate for past discrimination. As a result, the goal of racial and ethnic diversity through the enrollment of minority students will not be accomplished through programs which fail to take race into account.

Finally, a remedial admissions program that establishes a goal for the number of qualified disadvantaged minority applicants to be admitted is constitutionally permissible. Such a goal which, as is the case at Davis, sets neither a minimum nor a maximum for minority students, does not constitute a quota; indeed the ABA does not support the use of quotas in admissions programs. Unlike a quota, a goal is "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). Thus, a goal does not operate as a ceiling on the number of applicants of any ethnic or racial group who may be admitted to a professional school.

For these reasons, programs to encourage the admission of minority students to professional schools fulfill compelling state interests and amply satisfy strict scrutiny analysis. See *Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973) cert. denied 416 U.S. 957 (1974). Thus under any of the tests used in giving effect to the Equal Protection Clause, such programs are constitutional. It would, as the New York Court of Appeals declared in *Alevy* v. *Downstate Medical Center*, 39 N.Y. 2d 326, 334-35, 384 N.Y.S. 2d 82,

*See *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 435-36 (1968) (noting delay in implementation of *Brown* v. *Board of Education*).

89 (1976) "indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid."

CONCLUSION

The American Bar Association believes for the foregoing reasons that it is constitutionally permissible for a professional school to consider race as a factor, along with other factors, in selecting its student body from among qualified applicants.

Respectfully submitted,

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